IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 414

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

L. L. PRICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Questions Presented.

1. Did the National Railroad Adjustment Board determine whether, under the terms of the collective bargaining agreement and the circumstances of the case, the petitioner was entitled to discharge respondent because of his returning from Nipton to Las Vegas to eat?

2. If the National Railroad Adjustment Board did not determine whether the petitioner was entitled to discharge respondent because of his returning to Las Vegas to eat, was the District Court without jurisdiction to hear respondent's action for wrongful discharge?

Statement of the Case.

On July 12, 1949, respondent was a railroad trainman employed by petitioner in Las Vegas, Nevada. On that day he reported for duty at 9:15 P.M. and was instructed to deadhead on a train to Nipton, California, for swing service (extra brakeman) [R. 20].[1]

Article 32(b) of the collective bargaining agreement between petitioner and respondent's brotherhood provided that "Swing brakeman will not be tied up nor released at points where sleeping and eating accommodations are not available" [R. 9].

Respondent arrived at Nipton about 10:25 P.M. [R. 18]. He called the dispatcher in Las Vegas and was told to protect a train which would arrive at Nipton about 4:00 A.M., but to call in about 3:20 A.M. so that if another train was to arrive in time for the 4:00 A.M. train, respondent might be deadheaded back to Las Vegas [R. 17, 18]. Respondent told the dispatcher that there was no place to eat or sleep at Nipton and that he was returning on the first eastbound train to Las Vegas [R. 18].

Shortly after midnight, respondent called the dispatcher and said "I came into Las Vegas to eat. Do you want me to go back out on this MLA to protect the UX connection at Nipton," and was told it would not be necessary [R. 24, 25]. On July 16, 1949, he was notified to report for a hearing the following morning at 10 A.M. at the office of the Assistant Superintendent in Las Vegas for investigation and hearing on charges that he failed to protect his assignment as a swing brakeman at Nipton,

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[1]Record references are to the printed record.

California, on July 12, 1949, when he returned from Nipton to Las Vegas without authority to eat, in violation of certain operating rules [R. 13].

He appeared and requested a postponement so that he could have his representative, the local chairman of his brotherhood [R. 7] present [R. 14]. A postponement until 9:30 A.M. the following morning was granted [R. 14]. At that time he requested a further postponement on the ground that his representative was still not available, and was advised by the Chief Clerk to the Assistant Superintendent that the hearing would be deferred until 2:30 P.M. that day, and to get another representative [R. 16].

Respondent did not appear at 2:30 P.M. and a hearing was conducted in his absence by the Assistant Superintendent and the trainmaster [R. 12-29]. As a result of the hearing, he was discharged by the petitioner [R. 7]. He thereafter sought reinstatement with no impairment of rights and back pay, but the petitioner refused reinstatement on such basis [R. 29-36].

Subsequently, respondent's brotherhood submitted a claim in his behalf for similar relief to the National Railroad Adjustment Board [R. 5-41], and after petitioner had made its submission to the board, the brotherhood submitted a rebuttal thereto [R. 42-56]. On June 25, 1952, the board denied the claim, and although the brotherhood had argued in its submission and rebuttal that respondent broke no rules in returning from Nipton to Las Vegas for food, and that under the collective bargaining agreement the petitioner had no right to have respondent tied up at Nipton without eating facilities [R. 9-10, 42-46], the board made no findings or comment with respect to the matter [R. 56-59], except to state

that "Claimant was found to have wilfully disobeyed his orders" [R. 57]. In the submission the brotherhood also contended that petitioner had failed to comply with investigation rule contained in the collective agreement [R. 7-9].

On June 6, 1955, respondent filed a complaint in the District Court, alleging that he was wrongfully dismissed as a trainman by petitioner in violation of the provisions of a collective bargaining agreement, and prayed for money damages [R. 3-5]. Petitioner denied the allegations of the complaint and as a separate defense set forth the proceeding before the board and alleged that it constituted a bar to the action [R. 68-72]. Petitioner moved for summary judgment, which motion was denied after argument. Thereafter, petitioner moved for leave to move for summary judgment and for summary judgment [R. 85-90]. Among the exhibits to its motion were respondent's submissions to the board and its award [R. 87, 5-59]. After argument thereon, the District Court granted petitioner's motion [R. 94]. The Court of Appeals for the Ninth Circuit, with Judge Healy dissenting, reversed the judgment of the District Court and remanded the case for further proceedings, 255 F. 2d 663. A petition for rehearing was thereafter filed and denied.

ARGUMENT.

I.

The Board Did Not Pass on the Merits of Respondent's Complaint.

The merits of respondent's submission to the Board was whether under the terms of employment and the circumstances of the case, the petitioner could discharge respondent because of his return from Nipton to Las Vegas to eat. This question was clearly presented to the Board [R. 9, 10, 42-46]. Petitioner does not challenge that this was the merits, but contends that the Board found against respondent on this issue.

Petitioner states (p. 12) that the Board, in its findings, "held that Price's failure to follow orders was 'insubordination and merited discipline.'" The statement is misleading. What the Board said in this regard is as follows:

> "If the carrier is to have efficient operations on its railroad, employes must be relied on to obey operating instructions and orders. *Claimant was found to have wilfully disobeyed his orders.* This was insubordination and merited discipline.
>
> "The employe has been tendered reinstatement on a leniency basis but seeks complete vindication on the grounds that he was denied the investigation provided by the rules of agreement. Thus, the only question for review is whether there was substantial compliance with the investigation rule.
>
> "Basically, the complaint is that the hearing was held when the claimant was not present" [R. 57]. (Emphasis supplied.)

As pointed out by the Court below, the finding reported by the Board with respect to disobedience "was obviously not its own, but that of the superintendent of the rail-

road" who had conducted the investigation. Thus, as the Board did not pass on the issue of whether petitioner could discharge respondent for returning to eat, the Court was correct in holding that the Board failed to pass on the merits of the controversy before it.[2]

II.

The Decision of the Court Below Does Not Conflict With Decisions of Other Courts of Appeal.

1. Petitioner contends that the decision below is in direct conflict with two decisions of the Fifth Circuit, *Majors v. Thompson,* 235 F. 2d 449, and *Woolley v. Eastern Airlines,* 250 F. 2d 86, cert. den., 356 U. S. 931, which are claimed to hold that subsequent court action is precluded by reason of prior Board submission, irrespective of ultimate Board disposition.

In *Majors,* no question of whether the Board had determined the matter on the merits was presented. The only authority cited by the Court on election of remedies was *Michel v. Louisville & N. R. Co.* (5 Cir.), 188 F. 2d 224, cert den., 342 U. S. 862. In that case, the Court, on pages 225 and 226, said:

> "The primary question in the case is whether the voluntary submission of the employee's claim to the Division of the Railroad Adjustment Board having jurisdiction thereof, the prosecution of which was had with the full approval of the employee, and the determination of the claim upon the merits and adverse to the employee's contentions, presented a bar

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[2]Petitioner's contention that the Court below should not have examined the Board's Findings and the submissions before the Board (p. 18) is strange in view of the fact that the Findings and submissions were petitioner's exhibits in support of its Motion for Summary Judgment [R. 87].

to a subsequent suit upon the same employment contract between the claimant against the carrier in a suit at law for damages . . ."

And as the Board had held that "the dismissal of the Claimant was justified by the showing made," the Court held, page 227, that:

"It follows therefore that in the present case, it appearing from the uncontradicted facts that the question of whether the discharge of the appellant, Michel, was justified, on the one hand, or constituted a violation of the employment agreement on the other, has, in proceedings in effect instituted and prosecuted by appellant, been determined adversely to his contentions, he is therefore not legally entitled to maintain the present suit upon the same claim."

It is noteworthy that the Court below cited *Michel* as authority that an award must represent an adjudication on the merits to be final and binding.

In *Woolley*, the Court quoted from *Majors*, relying on *Michel*, and then went on to say that the decision of the Board that the discharge was proper was fully supported and thus was not reviewable on the merits.

Moreover, *United States v. Oregon Lumber Co.*, 260 U. S. 290, relied on and quoted from by petitioner (p. 8), was not a square holding that an election is made by the mere bringing of a suit, the Court there holding that the election became final by the fact that the United States, in an action to cancel for fraud a patent for public lands, upon ascertaining from defendants' plea that they intended to rely upon the statute of limitations, deliberately chose, instead of abandoning that suit and beginning an action at law where the statute if

limitations would not apply, to proceed with the original case upon the issues as they stood, and to follow it to a final determination. The Court also stated that the determination of the equity action on the basis of statute of limitations was on the merits.

The doctrine of election of remedies was not mentioned in the opinion below. Petitioner claims the Court failed to perceive the applicability of such doctrine (p. 7). Aside from the absence of authority holding the doctrine applicable where the Board has not determined the merits, this claim should be examined in the light of the fact that on the argument below, counsel for petitioner, in answer to a question of the Justice who wrote the opinion, conceded that if the Board had not made a determination on the merits, respondent had a right to maintain his action. The entire case turned on whether or not there had been a determination on the merits. The majority held that it had not, and the dissenting Justice held that the Board had disposed of the merits.

2. The contention that the decision below directly conflicts with decisions of the Courts of Appeals for the Second, Third and Tenth Circuits because it did not hold the award of the Board to be "final and binding" (p. 9) is without merit. The decision below stated that if an "aggrieved employee elects to proceed with his administrative remedy, and there obtains an adjudication on the merits, the award is 'final and binding' upon both parties to the dispute, except in so far as it shall contain a money award," citing *Michel v. Louisville & N. R. Co.* (5 Cir.), 188 F. 2d 224, 226, cert. den., 342 U. S. 862; *Washington Terminal Co. v. Boswell* (D. C. Cir.), 124 F. 2d 235, 249, affd. 319 U. S. 732; *Koelker v. Baltimore and Ohio Railroad Co.*, 140 Fed. Supp. 887, 889.

In *Weaver v. Pennsylvania Railroad Company* (2 Cir.), 240 F. 2d 350, affg. *per curiam*, 141 Fed. Supp. 214, the opinion of the District Court clearly indicates the Board there involved reviewed the merits of the controversy and the District Court itself examined the entire record and expressed the opinion that the discharged employee had been dealt with fairly and properly.

In *Bower v. Eastern Airlines* (3 Cir.), 214 F. 2d 623, 626, the Court specifically stated that Bower "sought and obtained from that Board a decision on the merits of his case."

In *Reynolds v. Denver & R. G. W. R. Co.* (10 Cir.), 174 F. 2d 673, 676, no question as to whether the Board decided the matter on the merits was raised, but the Court found that there had been an adjudication by the Board in favor of the Railroad Company upholding the dismissal of the appellant. Furthermore, the Court concluded that the finding of the District Court that the employee was not wrongfully discharged, but was properly discharged because of his conduct and acts, was supported by the record.

Thus, it is submitted that the decision below is wholly consistent with the above decisions relied on by petitioner to show a conflict.

III.

The Decision Below Will Not Create Litigation.

Despite the large number of wrongful discharge cases reported, there appears to be only one reported case in which any question was raised as to whether or not the Board decided a case of its merits. (*Koelber v. Baltimore and Ohio Railroad Company* (D. C., E. D. Pa.), 140 Fed. Supp. 887.) The absence of other reported

cases involving a similar situation indicates that the situation is an unique one. The decision below will undoubtedly have a salutary effect on the Board and recurrences will be unlikely.

The claim that the decision subjects railroads to a dual liability and "abrogated petitioner's rights under the Railway Labor Act affording either party before the Board the right of Board decision and its 'final and binding' effect" (p. 16) is without merit. Even if the Board had made an award on the merits in favor of respondent, its decision would not have been final, the findings and order being merely *prima facie* evidence of facts therein stated and enforcement of the award made only in a suit *de novo*. (45 U. S. C. A. 153 First (p); *Washington Terminal Co. v. Boswell,* 124 F. 2d 235, 244, affd. 319 U. S. 732.)

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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Attorney for Respondent.